

No. 83-1251

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In the Supreme Court

ALEXANDER L. STEVAS
CLERK

OF THE

United States

OCTOBER TERM, 1983

NATIONAL LIBERTY LIFE INSURANCE COMPANY,
Appellant,

VS.

STATE BOARD OF EQUALIZATION,
Appellee.

On Appeal From The Supreme Court
of the State of California

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

In its Motion to Dismiss or Affirm, at 8-9, Appellee agrees that the decision below rests upon an interpretation of *Scripto Inc. v. Carson*, 362 U.S. 207 (1960), which would, for purposes of determining constitutional jurisdiction to tax, permit California to treat *any* in-state activities of *true independent contractors* as if they were activities of an out-of-state company's employees. This far-reaching construction of *Scripto*, unsupported by the decision itself or any other authority, was necessary for the court below to conclude that California had taxing jurisdiction. Relying upon this erroneous interpretation, Appellee goes on to urge summary dismissal or affirmance of this appeal based upon the alleged variety and magnitude of Appellant's contacts with the state and this Court's prior refusal to consider three cases involving related issues. It is these points which Appellant's Brief in Opposition seeks to clarify.¹

Regarding Appellant's contacts with California, it is critical to recognize that the alleged multitude of National Liberty's "representatives" within California cited by Appellee is in fact limited to a few commercial relationships with true independent contractors, who performed occasional services of a type routinely utilized by out-of-state concerns. It is true that Retail Credit Company, an independent nationwide organization, was engaged occasionally to collect claims information through its various offices and employees; in some cases doctors of *insured parties* were also asked to supply medical records directly

¹Appellant National Liberty states pursuant to Rule 28.1 that the Designation of Corporate Relationships filed as Appendix D to Appellant's Jurisdictional Statement is currently accurate.

to Appellant; and California lawyers were hired to defend against one claimant's suit and to advise Appellant from time to time on California regulatory law. However, business contacts of this type are akin to the use of Dun & Bradstreet for credit checks, an "integral" function of many out-of-state businesses having California customers; reaching such businesses would represent a significant expansion of state taxing power. Moreover, predicated tax jurisdiction upon retention of legal counsel to defend a civil action equates constitutional jurisdiction to tax with that for subjecting an out-of-state concern to service of process, another novel result unsupported by case law.

Beyond National Liberty's engagement of these true independent contractors, Appellee can only emphasize the volume of Appellant's mail solicitation of California residents. However, Appellee's reliance on this contact and the "market exploitation" theory espoused by the *dissent* in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967) is clearly misplaced, given the conclusion reached by the *majority* in that case where a similar number of solicitations was present.

Appellee attempts to bolster its argument for summary disposition by reference to this Court's "declin[ing] to review" three prior insurance cases. *Ministers Life & Casualty Union v. Haase*, 30 Wis. 2d 339, 141 N.W.2d 287, *appeal dismissed*, 385 U.S. 205 (1966); *National Liberty Life Ins. Co. v. State*, 62 Wis. 2d 347, 215 N.W.2d 26 (1974), *cert. denied and appeal dismissed*, 421 U.S. 940, 946 (1975); *Armed Forces Cooperative Insurance Ass'n. v. Department of Insurance*, 622 P.2d 1318, (Wyo. 1980), *appeal dismissed*, 454 U.S. 1130 (1982). *Ministers Life* and *Armed Forces* are distinguishable from this case *inter alia* for the reasons

set forth at page 19 of Appellant's Jurisdictional Statement. As to the Wisconsin case involving National Liberty, dismissal of appeal hinged solely upon this Court's denial of a certiorari petition filed by the state (which had lost the case on an apportionment issue); the Court's dismissal was based upon its denial of certiorari and indicated nothing as to the merits of Appellant's contentions on a mooted issue. 421 U.S. 940.

Accordingly, this is a case of first impression, which involves an unprecedented expansion of the states' constitutional jurisdiction to tax under the aegis of *Scripto*, a case this Court has since referred to as "the furthest constitutional reach to date of a State's [taxing] power." *National Bellas Hess*, 386 U.S. at 757. The implications of the California court's approach are enormous, not only for the insurance industry but for all interstate businesses relying upon due process protection against extraterritorial taxation.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss or Affirm should be denied and this Court should note probable jurisdiction and grant plenary consideration of this appeal.

Dated: March 23, 1984

Respectfully submitted,

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